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Nos. 81-2147 and 81-2188
(Consolidated)

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF ARIZONA, *et al.*,
Petitioners,

v.

SAN CARLOS APACHE TRIBE OF ARIZONA, *et al.*,
Respondents.

STATE OF MONTANA, *et al.*,
Petitioners,

v.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENT FT. MC DOWELL MOHAVE-APACHE INDIAN COMMUNITY IN No. 81-2147

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QUESTION PRESENTED

WHETHER ADJUDICATION OF FEDERALLY-CREATED TRIBAL WATER RIGHTS IN FEDERAL COURT FOR INCORPORATION IN A COMPREHENSIVE STATE PROCEEDING IS PRECLUDED BY THIS COURT'S HOLDING IN *COLORADO RIVER WATER CONSERVATION DISTRICT* v. *UNITED STATES?*

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OPINIONS BELOW

In No. 81-2147, the opinion of the Court of Appeals in *San Carlos Apache Tribe* v. *Arizona* is reported at 668 F.2d 1093 and the opinion in *Navajo Nation* v. *United States* is reported at 668 F.2d 1100. (Pet. App. A and B). The order of the district court in *Navajo Nation* v. *United States* was not reported. (Pet. App. D). The opinion of the

district court relating to all of the other Arizona cases is reported at 484 F.Supp. 778 (D. Ariz. 1980). (Pet. App. E).

In No. 81-2188, the opinion of the Court of Appeals is reported at 668 F.2d 1080 (1982). (Pet. App. 26-50). A subsequent order clarifying the opinion (Pet. App. 51-52) is incorporated in the opinion as reported. The district court opinion is reported at 484 F.Supp. 31 (D. Mont. 1979). (Pet. App. 53-61).

JURISDICTION

The judgment of the Court of Appeals in *San Carlos Apache Tribe* v. *Arizona* was entered on February 23, 1982. The petition for a writ of certiorari in No. 81-2147 was filed on May 12, 1982 and was granted on October 4, 1982. The Order granting the petition in No. 81-2147 also ordered that case consolidated with *State of Montana, et al.* v. *Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, et al.*, No. 81-2188. This Court's jurisdiction rests upon 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. United States Code, Title 43, provides:

Section 666. Suit for adjudication of water rights—Joinder of United States as defendant; costs

(a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be

deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subjected to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances; *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate system.

2. United States Code, Title 28, provides:

Section 1362. Indian tribes.

The district courts shall have original jurisdiction of all civil actions, brought by an Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

3. Arizona Revised Statutes, provides:

Section 45-257. Hearings, report of master; final judgment by court; administration and enforcement of decree.

* * *

B. The court, upon review of the master's report and in accordance with rule 53 of the Arizona rules of civil procedure, shall:

1. Determine the extent and priority date of and adjudicate any interest in or right to use the water of the river system and source, provided when rights to the use of water or dates of appropriation have previously been determined in a judgment or decree of a court, the court shall accept the determination of such rights and dates of appropriation as found in the judgment or decree unless such rights have been abandoned.

* * *

STATEMENT OF THE CASE

The present Fort McDowell Indian Reservation is located in the aboriginal territory of the Yavapai Indians.[1] The reservation is at the site of the former Camp McDowell military reservation and was reserved for the Community's use and occupancy by Executive Order in 1903. III Kappler, *Indian Affairs, Laws & Treaties* 667 (1913). Thus, the Community has federal reserved water rights to the Verde River, which traverses the reservation from north to south, with a priority date from at least 1903 and perhaps from the date the military reservation was established or time immemorial. I J.A. 333, 335. Neither the extent nor the priority date of the Community's rights has been adjudicated.

Since 1917, the Salt River Project has been responsible for the care, operation and maintenance of the irrigation

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[1] The Community's members are actually Yavapai, but have been misdesignated by the Bureau of Indians Affairs as Mohave-Apache. Yavapai-Apache Indian Community, et al. v. United States, 15 I.C.C. 68, 98-99 (Docket #22-E, 1965).

works known as the Salt River Project. The Project's responsibilities include management of Bartlett Dam, constructed in 1939. Throughout this period, the Salt River Project has made excessive withdrawals from the Verde River upstream from the reservation. As a result, the flow of the river through the reservation has declined substantially and at times disappeared all together. Salt River Project diversions have caused extensive damage to vegetation, stock, and fish and wildlife on the reservation and affected the Community's entire economy. I J.A. 336-337.

A state administrative proceeding to determine the *inter sese* rights of all claimants for the Verde River was initiated in 1976. In 1979, this, and other administrative proceedings were transferred to Arizona Superior Court by virtue of the enactment of Ariz. Rev. Stat. § 45-251 *et seq.* (Supp. 1982) and those proceedings were consolidated with a similar Gila River general stream adjudication in 1981.[2]

Invoking the federal district court's jurisdiction under 28 U.S.C. § 1362, the Fort McDowell Indian Community (hereinafter the Community) filed suit on April 23, 1979, seeking relief on two separate but related claims. In its first claim for relief, the Community sought a declaration of its federally reserved rights to waters of the Verde River watershed against a defendant class composed of

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[2] According to the Arizona petitioners, the consolidated state proceeding will eventually determine the relative rights of approximately 150,000 claimants, including the United States, to waters in the Salt, Verde, Little Colorado and Gila Rivers. Ariz. Pet. Br., pp. 6-7. To date, however, only half of the potential claimants to those waters have been served in the state proceeding, service not even having begun on the Verde River claimants. *Id.* at 7, n.8.

all claimants to Verde waters. The Community did not seek a like determination of the defendants' rights to Verde River waters. In its second claim for relief, the Community sought damages and injunctive relief against the Salt River Valley Water Users' Association and the Salt River Project Agricultural Improvement and Power District (referred to jointly herein as the Salt River Project) for their excessive and damaging diversions of Verde River waters.

Defendants responded by motions to dismiss asserting various alleged defects in the complaint and affirmative defenses. All defendants moved for dismissal on the ground that the McCarran Amendment, 43 U.S.C. § 666, and related considerations of "wise judicial administration", *Colorado River Conservation District* v. *United States*, 424 U.S. 800, 817 (1976), required that the district court dismiss in favor of related state proceedings.[3]

On January 18, 1980, the district court dismissed both the Community's claims and the other original tribal actions, and remanded the removed actions to state court. *Matter of Determination of Conflicting Rights*, 484 F. Supp. 778 (D. Ariz. 1980). In support of its ruling, the district court relied solely on the McCarran Amendment and the considerations of wise judicial administration

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[3] The McCarran Amendment waives the United States' sovereign immunity to suit in either state or federal court where the action constitutes a comprehensive adjudication of all conflicting water rights in a river system. The Supreme Court read the McCarran Amendment in *Colorado River* as reflecting a congressional policy favoring unified adjudication of water rights in a system and held that the federal court in that case, a suit brought by the United States, should defer to a state court when such an adjudication was ongoing in state court. *See* the discussion, *infra*, at pp. 10-20.

discussed in *Colorado River, supra*, 424 U.S. 800. *Id.* at 784-85.

On appeal to the Ninth Circuit, the Arizona tribal actions were consolidated with Montana federal actions which had been dismissed by the district court on the same grounds as the Arizona cases. The Montana cases were decided first on February 22, 1982. *Northern Cheyenne Tribe* v. *Adsit*, 668 F.2d 1080 (9th Cir. 1982). Most of the Arizona cases were decided the next day. *San Carlos Apache Tribe* v. *State of Arizona*, 668 F.2d 1093 (9th Cir. 1982).[4] The Court reached the conclusion that Arizona has, because of the Arizona Enabling Act, 36 Stat. 557, 569 (1910), and through its constitution, Arizona Constitution, Art. XX, § 4, disclaimed jurisdiction over Indian lands. *Id.* On this issue, the Court adopted its reasoning and analysis in *Northern Cheyenne Tribe* v. *Adsit, supra. Id.* at 1097. The Arizona district court's dismissal of the tribal actions were therefore reversed. The cases were remanded, however for a determination of whether Arizona has properly asserted jurisdiction pursuant to Public Law 83-280, 67 Stat. 588, partially codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360 and as amended in 1968, 25 U.S.C. §§ 1321, 1322 and 1324.

Because of its decision on the disclaimer issue, the Ninth Circuit, in *San Carlos*, did not address at length the opinion that was the basis of the district court's dismissal, *Colorado River*. The Ninth Circuit said only "[w]e note that the district judge did not make findings on this

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[4] The suit brought by the Navajo Tribe was decided on February 24, 1982. Navajo Nation v. United States, 668 F.2d 1100 (9th Cir. 1982), and largely adopted the reasoning of the *San Carlos* and *Northern Cheyenne* decisions.

issue and the record indicates significant differences between these cases and the *Akin* case." *San Carlos* v. *Arizona*, *supra*, 668 F.2d at 1098.

SUMMARY OF ARGUMENT

This Court's decision in *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976), does not compel dismissal of the Fort McDowell Indian Community's federal action.[5]

I. The Ft. McDowell Community's federal action seeks a determination of its federally-created water rights and raises only federal issues. The determination of these federal rights is the proper business of a federal court and can be incorporated into the comprehensive state water proceedings as explicitly authorized in the Arizona statute. Ariz. Rev. Stat. § 45-257 (B)(1) (Supp. 1982). Duplication or disruption of the state proceedings can thereby be avoided. Thus unlike the federal suit in *Colorado River*, the Community's federal action will result in the conservation of judicial resources and the comprehensive adjudication of Verde River water rights by the state court.

II. In *Colorado River*, the federal action was brought by the United States under 28 U.S.C. § 1345. The Com-

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[5] The Community also contends that Arizona state courts lack subject matter jurisdiction over Indian water rights. Because of the Arizona Enabling Act of June 20, 1910, 36 Stat. 557, 569, and through the Arizona Constitution, Art. XX, sec. 4, Arizona has disclaimed jurisdiction over Indian property rights and this disclaimer has not been affected in any way by the McCarran Amendment.

The authority supporting these contentions are set out in detail in the brief filed by the Respondent Salt River Pima-Maricopa Indian Community and will not be repeated in this brief.

munity's federal suit was filed pursuant to 28 U.S.C. § 1362. The legislative history of section 1362 indicates that Congress' purpose in enacting it was to ensure a federal forum for Indian Tribes in suits involving their property rights. Congress preferred federal courts for the adjudication of tribal property rights because of the expertise and neutrality of those courts in dealing with Indian issues. The Arizona federal district court therefore had an especially strong obligation to exercise its jurisdiction over the Community's case.

ARGUMENT

Because of its strong preference for a federal court determination of its water rights in the Verde River, the Community filed a federal action to adjudicate its water rights roughly contemporaneously with the initiation of the state general stream adjudication.[6] The Community's action, which raises only federal law issues, was filed under 28 U.S.C. § 1362, a jurisdictional provision in which Congress acknowledged and expressed its sympathy for Indian tribes' preference for a federal forum in cases such as the Community's. The Community has, moreover, repeatedly expressed its intention to obtain a federal decree of its federal rights and offer that decree for incorporation into the state proceeding as authorized by Ariz. Rev. Stat. 45-257(B)(1).[7] In other words, the

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[6] As explained in the Statement of the Case, the Community's federal action was filed after the petition to initiate an administrative proceeding for Verde River claimants, but before that petition was transferred to Superior Court and a general stream adjudication commenced thereby.

[7] The parties in the state litigation need not rely solely on the Community's assurances that it will offer its federal decree in the state proceeding. The United States, joined in the state proceeding under the McCarran Amendment, would surely offer that decree as the tribe's trustee should the Community itself prove negligent.

Community has purposefully proceeded in the manner best calculated in its view to accommodate the state and federal interests at stake in this litigation. Its narrow federal action will not burden the federal court with the adjudication of any state water law issues or the administration of any water rights at all, will not duplicate, delay or prevent the state general stream adjudication, and yet will give effect to the Community's and Congress' choice of forum for its reserved water rights. Such an accommodation represents complete adherence to "considerations of wise judicial administration, giving regard to the conservation of judicial resources and the comprehensive disposition of litigation," and ensures full implementation of the McCarran Amendment "policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals." *Colorado River*, 424 U.S. at 817, 819.[8] For those reasons, the federal court should proceed to adjudicate the Community's federal claims.

I. Unlike The Federal Action Considered In *Colorado River*, The Community's Federal Action Will Neither Duplicate Nor Impair The Comprehensive State Proceeding.

In *Colorado River*, the Court considered the propriety of dismissing a federal water suit where the same issues could be determined in an on-going comprehensive state proceeding. The federal action in question had been filed by the United States which asserted federal reserved

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[8] The United States has asked the Court to clarify the rules of wise judicial administration as they apply to Indian water rights actions, U.S. Memorandum, p. 16. Whether the Court is inclined to adopt the government's 'bright line' rule or rely on a case by case analysis, the Community's action, as will be demonstrated in this discussion, is precisely the type of case that should be litigated in federal court.

water rights, reserved water rights for Indians, and water rights under state law as well in Colorado Water Division No. 7. In addition, the United States sought the appointment of a water master to administer any water rights decreed to it in the federal litigation. The state proceeding, which was filed shortly after the federal suit, contemplated the comprehensive adjudication and administration of water rights in Division No. 7 as authorized by the Colorado Water Rights Determination and Administration Act. *Colorado River*, 424 U.S. at 804-06.

Although the Court concluded that abstention principles proper did not apply, it found dismissal of the federal action proper under the circumstances because of considerations of "wise judicial administration". *Colorado River*, 424 U.S. at 817. As authority for its application of the principles of wise judicial administration, the *Colorado River*, Court relied on *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.*, 342 U.S. 180 (1952). The *Kerotest* principles have, in turn, been summarized as follows:

> "*Sound judicial administration counsels against separate proceedings, and the wasteful expenditure of energy and money incidental to separate litigation of identical issues should be avoided . . .* Here the same issues, and apparently to a large extent the same evidence, will be considered in both actions, and the two proceedings could duplicate discovery. We take note of crowded dockets across the country, and the consequent desirability of deciding common issues in one tribunal rather than two. We also note, in addition to economic factors, the value of eliminating the risks of inconsistent adjudications and races to obtain judgments." (Emphasis added.)

Columbia Plaza Corp. v. *Security National Bank*, 525 F.2d 620, 626-27 (D.C. Cir. 1975), *cited with approval in*

Colorado River, 424 U.S. at 817. By its reliance on *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.*, the Court in *Colorado River*, made clear its understanding that the principles of wise judicial administration referred primarily to the avoidance of duplicative litigation.[9] Under the circumstances of that case, duplication of judicial efforts was, indeed, inevitable. Although the Colorado water code does contain an incorporation provision, it authorizes the incorporation of decreed water rights only when "established by adjudication decrees in proceedings concluded or pending on June 7, 1969," section 37-92-301(3), Colo. Rev. Stat. (1963). The federal suit under consideration in *Colorado River* was filed on November 14, 1972, well after the cut-off period set in the Colorado statute. Any rights decreed in the federal suit would of necessity, then, have been relitigated in the comprehensive state proceeding—a result offensive to principles of wise judicial administration.[10]

To be sure, the avoidance of duplicative litigation alone did not persuade the *Colorado River* Court to affirm

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[9] In fact, the *Colorado River* decision has been commonly understood as establishing a new branch of abstention under which a federal court may defer to a parallel state proceeding to avoid wasteful duplicative litigation. *See generally note*, "Federal Court Stays and Dismissals in Deference to Parallel State Court Proceedings: The Impact of Colorado River," 44 U. of Chi. L. Rev. 641; M. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* (1980), pp. 249-55.

[10] Because of the peculiarity of the Colorado incorporation provision, the *Colorado River* dissenters' suggestion that duplication could be avoided by including the federal decree in the final state tabulation was not workable. *Colorado River*, 424 U.S. at 825. The Arizona incorporation provision has no limitation on incorporation of other decrees and, thus, does provide a workable solution to the problem of duplicative litigation here. *See* discussion, *infra*, pp. 15-19.

To be sure, the avoidance of duplicative litigation alone did not persuade the *Colorado River* Court to affirm dismissal of the federal action. An important factor counselling against the concurrent federal proceeding was, "the clear federal policy evinced . . ." by the McCarran Amendment of "avoiding piecemeal adjudication of water rights in a river system . . . a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving their goals" *Colorado River*, 424 U.S. at 819; *see also Will* v. *Calvert Fire Insurance Co.*, 437 U.S. 655, 673 (1978), where Justice Brennan concluded that a "federal policy favoring unitary state adjudication . . ." compelled dismissal of the parallel federal suit in *Colorado River*.[11] Likening water adjudication to *in rem* proceedings, the Court suggested that the federal court, by entering its decree before the state court, could effectively preclude application of the state adjudicatory and administrative system to the adjudicated waters. In that event, the federal proceeding would completely frustrate the policy embodied in the McCarran Amendment which acknowledges comprehensive state systems as the preferred mechanism for determining water rights *inter sese*.

It was the potentially disruptive effect of the federal litigation on the comprehensive state proceeding which led the *Colorado River* Court to caution against piecemeal water litigation. The sole authority cited by the

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[11] Although writing in dissent in *Will* v. *Calvert Fire Insurance Co.*, Mr. Justice Brennan, who authored the majority opinion in *Colorado River*, represented the majority's view on that particular point. *See* In re Mercury Const. Corp., 656 F.2d 933 (4th Cir. 1981) (*en banc*).

Court for its piecemealing proscription reflects that concern:

> "Ordinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties. *Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided.*" [Emphasis added.]

Brillhart v. *Excess Ins. Co. of America*, 316 U.S. 491, 495 (1942), *cited with approval in Colorado River*, 424 U.S. at 818. Read against the *Brillhart* authority cited by the Court, the *Colorado River* caution against piecemeal water litigation clearly refers to the disruptive and possibly disabling effect of the separate federal litigation on the comprehensive state proceeding. Dismissal of the federal action was required to avoid that disruption and the resulting displacement of the federal policy favoring unified adjudication of water rights by states.[12]

For precisely the opposite reasons, the limited federal action filed by the Community should proceed. In its federal action, the Community seeks only an adjudication of claims based purely on federal law. The decree obtained in that proceeding can be incorporated into the state general decree, thereby avoiding any duplication of effort between the federal and state courts. Significantly,

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[12] One commentator, reading the *Colorado River* decision to the same effect, has suggested that federal courts would likely entertain those water suits seeking adjudication of federal reserved water rights only. R. H. Abrams, "Reserved Water Rights, Indian Rights and the Narrowing Scope of Federal Jurisdiction: The *Colorado River* Decision," 30 Stan. L. Rev. 1111, 1147 n.222 (1978).

the Arizona statute is much broader in that respect than the Colorado statute. The Arizona act directs that "when rights to the use of water or dates of appropriation have been determined in a judgment or decree of a court, the court *shall* accept the determination of such rights and dates of appropriation as found in the judgment or decree . . ." Ariz. Rev. Stat. 45-257(B)(1). (Emphasis added.)[13] Under that provision, the Arizona state court must incorporate all timely decrees, so that the avoidance of duplicative litigation is assured here. The primary considerations of avoiding duplicative litigation and disruption or displacement of the comprehensive state proceeding are, therefore, fully satisfied.

In fact, duplication of judicial effort here can be avoided only by the incorporation mechanism proposed by the Community and authorized by the Arizona statute. The Community's complaint seeks not only an adjudication of its water rights, but also asserts a federal law claim for damages and injunctive relief against the Salt River Project. Even if the state court does have concurrent jurisdiction with the federal court to adjudicate the Community's first claim, the petitioners have never asserted that the state court either has jurisdiction over or would adjudicate the Community's second claim in the comprehensive

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[13] The Arizona Court of Appeals has determined that section 45-257(B)(1) actually deprives the Water Commission (now Superior Court) of jurisdiction over water rights already determined by court decree. St. John's Irrigation and Ditch Co. v. Arizona Water Comm'n, 621 P.2d 37 (Ariz. App. 1980). *See also* Eden Irrigation Co. v. District Court, 61 Utah 103, 211 P. 957 (1922), construing a very similar provision in the Utah water code as mandatory.

state proceeding.[14] As a result, regardless of which forum determines the Community's water rights, the federal court must at some point adjudicate the Community's second federal claim. Because the priority date and extent of the Community's water rights are obviously elements of its damages claim for violation of that right, the federal court may very well be obliged to relitigate those issues even if they are determined by the state court. As Justice Brennan has observed, it is doubtful whether a state court determination on an issue of law can bind a federal court in a claim over which it has exclusive jurisdiction. *Will* v. *Calvert Insurance Co.*, 437 U.S. at 674-75 (J. Brennan dissenting, joined by Justices Marshall and Powell on this point). Although the issue is still an open one, relitigation of the Community's first claim can only be avoided with certainty by allowing the federal court to determine that issue in the first instance.

There is, moreover, every reason to believe that the federal court can determine the Community's rights well before the issue would be joined in the massive state proceeding. Taking the Arizona petitioners' description of the state proceeding on its face, it is apparent that litigation of the Community's rights in that forum is years if not decades away. Although the administrative petition was filed in 1976, service of process on the Verde River

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[14] The Arizona petitioners apparently acknowledge that state court clearly does not have jurisdiction over the Community's second cause of action. Such jurisdiction could not be based on the McCarran Amendment, since it by its terms is limited to suits "for the adjudication of rights to the use of water of a river system . . ." 43 U.S.C. 666. Since Arizona has not assumed general civil jurisdiction over tribes under Public Law 280, there is not even an arguable basis for state jurisdiction over the Community's second claim.

claimants has not yet begun. Neither does the stay of the state proceeding entered after the Ninth Circuit decisions explain the extended delay—the petition has been pending for seven years while the stay has been in effect for only one year. Lengthy delays are simply inherent in comprehensive water litigation and are sure to occur in massive ligitation such as the adjudication of 150,000 water claims.[15] The Community's narrow federal suit can certainly be litigated well before its water rights would be tried in the consolidated state proceeding.

As a result, the Community's federal suit, unlike that considered in *Colorado River*, will not duplicate the state proceeding or frustrate the McCarran Amendment policy which recognizes the availability of comprehensive state systems for adjudication of water rights. To the contrary, allowing the Community's suit to proceed will insure that duplication of judicial effort will be avoided and the McCarran Amendment policy favoring unified state proceeding will be given full play.[16]

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[15] If the past performance of the state court in this respect is any indication, it will be at least 1988 before the comprehensive state proceeding will begin in any meaningful sense. Service on the 12,000 Salt River claimants was completed five years after the petition was filed. Service on the estimated 80,000 Verde River claimants will surely take as long if not longer.

[16] The Arizona petitioners suggest that the "congressional understanding underlying" § 304 of the Colorado River Basin Project Act, 43 U.S.C. § 1524(d), would be subverted if the Community's federal action is allowed to continue. Ariz. Pet. Br., pp. 40-41. This contention is based upon the assumption that the Community's federal suit will "make it impossible to have a complete adjudication of water rights." *Id.* As we have shown, however, federal adjudication of the Community's water rights will do no such thing. In addition, neither 43 U.S.C. § 1524(d) nor its legislative history provides that the

Despite the limited nature of the Community's federal suit and the directory language at Ariz. Rev. Stat. 45-257(B)(1), the Arizona petitioners insist that not all claimants are before the federal court in the Community's action and any decree in that case must, as a result, be relitigated in state court. Ariz. Pet. Br., p. 45. The error in petitioners' assertion is two-fold. First, the Community's complaint alleges a defendant class and by that device has brought all water claimants in the Verde River watershed before the federal court.[17] Second, even were the defendant class not certified for some reason, all private claimants in the watershed could nonetheless be bound through the State's participation in the suit. The Community's complaint names the State of Arizona as a defendant both as a water claimant and as *parens patriae* representing all private water claimants. I J.A. 330, 331-32. A decree against the state would, as a result, bind all private water claimants. *New Jersey* v. *New York*, 345 U.S. 369 (1953); *Nebraska* v. *Wyoming*, 295 U.S. 40

"complete adjudication" of water rights mentioned in the legislative history must take place entirely in state court. The Arizona petitioners, thus, are simply wrong in concluding the Community's federal suit will preclude the state general stream adjudication and in suggesting that Congress, in the Colorado River Basin Project Act, intended that all water rights on the Gila River system be adjudicated in state court.

[17] The United States' immunity from suit either as a named defendant or class member was waived by the McCarran Amendment since the federal suit is, in effect, the first step toward a determination of all rights in the river system. Neither would the United States be precluded from representing all federal interests (tribal or otherwise) against the Community. Since the Community does not seek an adjudication of the defendants' water rights in its federal suit, the defendants' interests in that law suit are not competing but are identical—*i.e.* minimizing the Community's water rights.

(1935); *Hinderlinder* v. *LaPlata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938); *Wyoming* v. *Colorado*, 286 U.S. 494 (1932); *see also Washington* v. *Fishing Vessel Ass'n*, 443 U.S. at 692 n.32 (1979). By adding the United States as a named defendant rather than a class member, all federal interests could also be bound. Either way, the Community can obtain a federal decree of its rights which is binding against all other Verde claimants and which is a proper candidate for inclusion in the final state decree.

Finally, the petitioners refer to four other factors evaluated by the Court in *Colorado River* as supporting dismissal of the Community's federal suit. Ariz. Pet. Br., p. 40 n.40. First, claim the petitioners, the Community's federal action is like that in *Colorado River* in that there have been no proceedings there other than filing the complaint. Unlike the situation in *Colorado River*, though, neither have any proceedings taken place in the state proceeding. Because service has not yet been made on the Verde claimants in the state case, the federal litigation is in fact more advanced than the state litigation. Second, the petitioners refer to extensive involvement of state water rights in the state proceeding. The Court in *Colorado River*, however, was troubled by the presence of such claims in the *federal* case, not the state litigation. *Colorado River*, 424 U.S. at 820. Since there are no state claims in the Community's federal action, this factor actually supports the exercise of federal court jurisdiction here. Third, the petitioners essentially concede that litigating the Community's claim in federal district court sitting in Phoenix is not inconvenient for the parties. Fourth, the petitioners suggest that the voluntary participation of the United States in the state proceeding indicates the propriety of dismissing the federal action. That factor was relevant in *Colorado River* where the federal action was filed by the United States, but is

not relevant here where the federal action was filed by the Community pursuant to 28 U.S.C. section 1362. *See also Colorado River*, 424 U.S. at 820 n.26, where the Court expressly reserved the question of whether similar considerations would permit dismissal of a private water suit. Every consideration discussed by the *Colorado River* Court, then, demonstrates the appropriateness of the exercise of federal jurisdiction over the Community's federal law claims.

II. The Federal Court's Obligation To Exercise Jurisdiction Is Especially Strong Where A Tribe Invokes Jurisdiction Pursuant To 28 U.S.C. § 1362.

This Court stated in *Colorado River* that federal courts have "a heavy obligation" to exercise the jurisdiction that has been given them. *Colorado River* v. *United States*, 424 U.S. at 820. That obligation is especially strong where a tribe invokes jurisdiction under 28 U.S.C. § 1362. In this part of the brief, we briefly review the long history of federal court protection of Indians' federal rights which, culminating with the enactment of 28 U.S.C. § 1362, supports a federal forum here.

The tribe invoked the jurisdiction of the federal courts in these cases simply because it feels that only the federal courts have the expertise and the neutrality necessary to adjudicate their rights. There are few groups of people whose lives have been so affected by and are so cognizant of the historical relationships between the federal and state governments and their respective relationships with Indian tribes. It is a history in which federal authority over Indians is dominant and where states have been hostile both to that dominance and to the reservation inhabitants in their midst.

This Court long ago recognized that Indian tribes "owe no allegiance to the State, and receive from them no

protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies." *United States* v. *Kagama*, 118 U.S. 373, 384 (1886). The passage of time has not in any way changed the situation described by the Court in *Kagama*. If anything, recent decisions of the Court have illustrated even more vividly the hostility of the states to the rights of Indians. *See,e.g.*, *Washington* v. *Fishing Vessel Ass'n*, 443 U.S. 658, 696 n.36 (1979) ("Except for some desegregation cases, the [federal] district court has faced the most concerted official and private efforts [by, among others, Washington's state courts] to frustrate a decree of a federal court [establishing Indian fishing rights] witnessed in this century."); *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 678 (1974) ("There has been recurring tension between federal and state law; state authorities have not easily accepted the notion that federal law and federal courts must be deemed the controlling considerations in dealing with the Indians.")[18]

Numerous acts of Congress, recognizing the frequent hostility of state institutions to Indian rights, also have

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[18] *Compare* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1932)—where the Court said: "The whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the government of the United States,"—*with* Williams v. Lee, 358 U.S. 217, 221 (1959)—where the Court noted: "Significantly, when Congress has wished the States to exercise this power [civil and criminal jurisdiction over Indians] it has expressly granted them the jurisdiction which *Worcester v. Georgia* had denied." State jurisdiction over Indians and Indian property has time and again been held preempted by federal law and policy. *E.g.*, The Kansas Indians, 72 U.S. (5 Wall.) 737, 755 (1886); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 174-75 (1973); Bryan v. Itasca County, 426 U.S. 373, 381 (1976).

provided specifically for their enforcement in federal court.[19] The most important of these statutes, for present purposes, is 28 U.S.C. § 1362, which authorizes Indian tribes to bring federal question suits in federal courts without regard to the amount in controversy and which the Community invoked in filing its federal action. Enacted in 1966, section 1362 evinces clear congressional policy that federal courts are the proper—indeed, the exclusive—forum for deciding suits brought by Indian

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[19] One such law is 25 U.S.C. § 345, originally enacted in 1894, 28 Stat. 305, which makes federal district courts the exclusive forums for adjudicating disputes relating to Indian allotments without regard to either the amount in controversy or the existence of a federal question. McKay v. Kalyton, 204 U.S. 458, 467-69 (1907).

25 U.S.C. § 357, enacted in 1901, provides that Indian allotted land "may be condemned for any public purpose under the laws of the State . . . where located in the same manner as land owned in fee may be condemned." On its face the statute is silent as to whether the condemnation proceedings are to take place in state or federal courts. Despite the fact that section 357 makes state substantive law applicable to some Indian lands, Minnesota v. United States, 305 U.S. 382 (1939), held that it did not confer jurisdiction on state courts.

In 1953, during the height of the termination era, Congress enacted Public Law 83-280, 67 Stat. 588, now partially codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360 and, as amended in 1968, 25 U.S.C. §§ 1321, 1322 and 1324. Public Law 83-280 also demonstrates Congress' commitment to having Indian property disputes resolved in the federal courts. While expressly conferring civil jurisdiction on state courts to adjudicate some controversies arising in Indian country, Congress specifically withheld from those courts jurisdiction to adjudicate "the ownership or right to possession of [real or personal property *including water rights*, belonging to any Indian or Indian tribe] or any interest therein." 28 U.S.C. § 1360(b), 25 U.S.C. § 1322(b) (emphasis added). Thus, even when Congress extended state jurisdiction over Indians, it was careful to insure that Indian property and water rights would not be adjudicated in state courts.

tribes to protect their property rights arising under federal law.

The House Report on the bill that became section 1362 recognized that "the issues involved in cases involving tribal lands . . . are Federal issues," and "particularly as to this class of cases it is appropriate that the actions be brought in the U.S. district court," H.R. Rep. No. 2040, 89th Cong., 2d Sess. 2, *reprinted in* 1966 U.S. Code Cong. & Ad. News 3145, 3146. The Senate Report echoes the same considerations: "[f]ederal courts have more expertise in deciding questions involving treaties with the Federal Government, as well as interpreting the relevant body of Federal law that has developed over the years," S. Rep. No. 1507, 89th Cong., 2d Sess. 3 (1966).

The longstanding national Indian policy expressed by section 1362 is that Indian tribes may have their federally protected rights, "essential to the life of the Indian people," adjudicated in federal court.[20] The statute means what it says; its purpose was that "tribes should not be required to conduct . . . litigation [involving federal issues] in the State courts." S. Rep. No. 1507, 89th Cong.,

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[20] In *Colorado River*, 424 U.S. at 812-13, the Court stated that Indian water rights would not be jeopardized by being subjected to legal challenge in state courts. But the Court's suggestion in *Colorado River* that its ultimate review of erroneous determinations by state courts is, we respectfully suggest, insufficient protection for Indian reserved rights for two reasons. First, as illustrated by the pending adjudications in the two states involved in the instant suit, there are simply too many such cases to expect plenary review of the myriad questions of fact and law presented by every such judgment. Many of these questions are not of general importance because they are unique to each particular reservation. Second, the most crucial determinations involving the extent of Indian water rights are factual. *See, e.g.*, February 22, 1982 Report of the Special Master in

2d Sess. 3 (1966). This purpose can only be effectuated by retaining federal court jurisdiction of the Community's case. It would be contrary to the purposes of the statute and the long and consistent history on which it is based, to allow dismissal of this case, particularly where, as here, the issues involve property "questions of life-and-death importance to [the] Indians." *Colorado River Water Conservation District* v. *United States*, 424 U.S. at 826 (Stewart, J., dissenting).[21]

Thus, both the history of exclusive federal authority over Indian property from which section 1362 springs, and the statute's legislative history, establish that the purpose of section 1362 is to ensure a federal forum for suits brought by Indian tribes involving Indian property rights. That purpose is fulfilled in this case by an adjudication such as that suggested by the Community in Part I—a determination of the Community's federal rights in federal court with the resulting decree being incorporated into the comprehensive state proceeding. In this way, both the federal courts' section 1362 obligation to exercise jurisdiction over tribal claims and the *Colora-*

Arizona v. *California*, U.S. Sup. Ct. No. 8 Original. Appellate review of any trial court's quantification of Indian reserved rights is necessarily limited. See R. H. Abrams, "Reserved Water Rights, Indian Rights and the Narrowing Scope of Federal Jurisdiction: The *Colorado River* Decision," 30 Stan. L. Rev. 1111, 1130 (1978).

[21] Precluding dismissal of suits filed by Indian tribes under section 1362—but allowing dismissal of suits like *Colorado River* brought by the United States under section 1345—is justified by the specially protective purposes intended by Congress when it enacted section 1362. There is no comparable legislative concern in the history of section 1345.

do River preference for general stream adjudications conducted in state court are harmonized and effectuated.

CONCLUSION

Examined dispassionately, the steps taken by the Fort McDowell Indian Community to obtain a federal adjudication of its federal water claims are eminently reasonable and workable. By seeking an expeditious federal court determination of its water rights only, the Community has avoided burdening the federal court with complex and lengthy water litigation and has not disturbed the eventual adjudication of all rights to Verde River waters by the state court. As a result, the principles of wise judicial administration are furthered and the McCarran Amendment policy favoring comprehensive state litigation of water rights is honored. Most importantly for the Community, the strategy also preserves the access to federal court for tribal property claims promised by Congress. Under the circumstances, there is simply no reason to deny the Community its choice of forum.

Respectfully submitted,

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